REMARKS/ARGUMENTS

Applicants respectfully request reconsideration of the present application in view of the above changes to the claims and the following remarks, which are responsive to the Office Action mailed November 10, 2009.

I. Interview

Applicants' attorney wishes to thank the Examiner for the telephonic interview on January 13, 2010. In the interview, Applicants' attorney and the Examiner discussed the references cited in the Office Action and each party's understanding of the claims in the pending application. This response includes the arguments discussed in the interview.

II. Status of Claims

In the Office Action, Claims 1, 4-7, 12, 16-22, and 26-27 were noted as pending in the application and were rejected. Applicants have amended Claims 1, 16, 19, and 22 to further clarify the claimed invention. As a result, Claims 1, 4-7, 12, 16-22 and 26-27 remain currently pending.

III. Rejection of Claims

The Office Action rejected Claims 1, 4, 16, 19, 22, and 26 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 7,127,521 B2 to Hsu et al. (hereinafter "*Hsu*"). The Office Action further rejected Claim 12 under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of what was well known in the art. Claims 5-7, 17-18, 20-21, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of U.S. Patent No. 5,619,650 to Bach et al. (hereinafter "*Bach*").

a. 35 U.S.C. 102 – *Hsu*

i. Independent Claims 1, 16, 19, and 22

Independent Claims 1, 16, 19, and 22 recite, in somewhat different language, a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is less than or equal to the least of a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts. Applicants respectfully submit that *Hsu* at least fails to disclose this recitation of the independent claims for various reasons that will be explained in greater detail below.

The Office Action fails to identify any data throttle in *Hsu* less than or equal to the least of a data transfer rate of a first host, a data transfer rate of a second host, **and a data transfer rate of a network between the first and second hosts**. Instead, the Office Action appears to consider only the potential linking modes of a local network interface card and a remote network interface card. In particular, the Office Action states that *Hsu* "discloses a scenario in which the network load is monitored in order to throttle the data to the lowest network rate of 10 Mbps" (Office Action, pages 2-3). The 10 Mbps rate, however, is not the lowest network rate, but rather the lowest of the three potential linking modes (i.e. 1 Gbps, 100 Mbps, and 10 Mbps) of a single network interface card. The claims do not suggest that the throttle should be set to the lowest of the three rates that a single network interface card is capable of. If this were true, the throttle of *Hsu* would always have to be set to 10 Mbps, which it is not. Instead, the claims recite that, at start-up, the data transfer rates of a first host, a second host, and a network between them are determined and the throttle is set to the least of those three data transfer rates. In *Hsu*, the data transfer rate of the network is never discussed. As such, the data transfer rate of the local network interface card is never throttled to a rate that considers the data transfer rate of the network.

The closest value to a network data transfer rate disclosed in *Hsu* is the periodically measured average network load. As shown in Figure 6, however, the average network load can actually be much lower than the purported "lowest network rate" of 10 Mbps (e.g. 5 Mbps at

time t2 or 8 Mbps at time t3). Indeed, Figure 6 shows that the average network load is **always** lower than the current linking mode of the local network interface card. Thus, if the average network load were equivalent to the third data transfer rate of the network between the first and second hosts and the average network load is always lower than the data linking mode of the network interface cards, the data transfer rate of the local network interface card should be throttled to the value of the average network load, which it is not.

If *Hsu* discloses a value other than average network load meant to equal the third data transfer rate of a network between a first and second host, it has not been identified in the Office Action. Applicants assert that no such value is described in *Hsu*. During the telephonic interview, the Examiner conceded that while a data transfer rate of a network between a first and second host of *Hsu* may be inferred to exist, it is never described with specificity. It follows that since such a network data transfer rate is never described, *Hsu* does not disclose using a network data transfer rate to determine a throttle value at a first host.

Applicants note that the entire purpose of *Hsu* is to "reduce power consumption in a network linking system" (*Hsu*, Abstract and Col. 2, lines 10-12). *Hsu* accomplishes this goal by reducing the linking speed of the network interface cards so that they are always as low as possible **while still being greater than the average network load**. In fact, *Hsu* never discusses throttling data, because throttling data is not an objective of *Hsu*. In *Hsu*, the linking speed is **always** greater than the average network load, but the extent to which the linking speed exceeds the average network load is kept as low as possible (*Hsu*, Figure 6). As *Hsu* notes, the power consumption increases as the linking speed increases (*See Hsu*, Col. 1, lines 60-65). Thus, to reduce power consumption, *Hsu* keeps the linking speed at the lowest speed possible that still allows **all** data to be transferred **without any throttling occurring**.

Applicants additionally point out that *Hsu* fails to disclose obtaining the data transfer rate of a network between the first and second hosts *during a communication start-up process from signaling*, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22. As mentioned above, Applicants respectfully assert that a data transfer rate of a network

between a first and second host is not described in *Hsu*. At best, *Hsu* discloses an average network load, which is not the same. Even so, *Hsu* states that "**[a]fter linking**, the load monitoring module is enabled to perform monitoring of network flow [and] evaluate the average load within a time interval (for example, 10 minutes)" (*Hsu*, Col. 4, lines 63-66). Therefore, not only does *Hsu* not obtain the average network load from signaling, *Hsu* requires a period of time **after linking** in which to monitor and evaluate the network to determine the average load. While allowing ten minutes of transmitting unthrottled data before ever determining the network data transfer rate could lead to significant congestion on the network, even the congestion created during the shortest monitoring time interval described by *Hsu* of ten seconds is a clear disadvantage over obtaining the network data transfer rate during a communication start-up process (*Hsu*, Col. 5, line 14). Thus, even if the average network load was the same as the data transfer rate of the network, the average network load is not obtained during a communication start-up process from signaling, as recited in the independent claims.

Based on the all of the foregoing arguments, Applicants respectfully assert that *Hsu* does not teach or suggest all of the recitations of independent Claims 1, 16, 19, and 22 and respectfully requests that the rejection of these claims be withdrawn.

To the extent these rejections are premised upon Official Notice, such reliance is seasonably challenged and the Examiner is respectfully requested to identify and cite to a reference if these rejections are to be maintained.

ii. Dependent Claims 4 and 26

Claims 4 and 26 depend from independent Claims 1 and 22, respectively, and include all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claims 1 and 22, it is respectfully submitted that dependent Claims 4 and 26 are further patentable over the references cited as such dependent claims now depend from an allowable base claim.

b. 35 U.S.C. 103 – *Hsu* in view of what was known in the art

i. Dependent Claim 12

Claim 12 depends from independent Claim 1 and includes all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. What was known in the art does not cure the noted deficiencies of *Hsu* and is not cited by the Examiner as doing so. Thus, for at least the reasons set forth above with respect to independent Claim 1, it is respectfully submitted that dependent Claim 12 is further patentable over the references cited as such dependent claim now depends from an allowable base claim.

c. 35 U.S.C. 103 – *Hsu* in view of *Bach*

i. Dependent Claims 5-7, 17-18, 20-21, and 27

Claims 5-7, 17-18, 20-21, and 27 depend from independent Claims 1, 16, 19, and 22, respectively, and include all of the recitations of the base claims and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. The teachings of *Bach* do not cure the noted deficiencies of *Hsu* and are not cited by the Examiner as doing so. Thus, for at least the reasons set forth above with respect to independent Claims 1, 16, 19, and 22, it is respectfully submitted that dependent Claims 5-7, 17-18, 20-21, and 27 are further patentable over the references cited as such dependent claims now depend from allowable base claims.

IV. Conclusion

In light of the remarks above, Applicants respectfully submit that the application is in condition for allowance and respectfully requests that a Notice of Allowance be issued. The Examiner is encouraged to contact Applicants' undersigned attorney to resolve any remaining issues in order to expedite examination of the present application.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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